Supreme Court, U.S.
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No. 06-282

In The
Supreme Court of the United States

CATHOLIC HEALTHCARE WEST,
CATHOLIC HEALTHCARE WEST ARIZONA,
and MICHAEL BERENS,

Petitioners,

v.

UNITED STATES OF AMERICA ex rel.
PATRICIA HAIGHT and IN DEFENSE OF ANIMALS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR THE PETITIONERS 1

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

Archer v. Warner, 538 U.S. 314 (2003) 4

Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 2

Cooper v. Blue Cross & Blue Shield, 19 F.3d 562 (11th Cir. 1994) 6

Hagood v. Sonoma County Water Agency, 81 F.3d 1465 (9th Cir. 1996) 6

Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939 (1997) 3

United States ex rel. Grynberg v. Praxair, Inc., 389 F.3d 1038 (10th Cir. 2004) 3

United States ex rel. Mistick PBT v. Housing Auth., 186 F.3d 376 (3d Cir. 1999) 1, 2, 5

United States ex rel. Precision Co. v. Koch Indus., Inc., 971 F.2d 548 (10th Cir. 1992) 6

United States ex rel. Reagan v. E. Texas Med. Ctr. Reg'l Healthcare Sys., 384 F.3d 168 (5th Cir. 2004) 1, 5

United States v. Solinger, ___ F. Supp. 2d ___, 2006 WL 2927509 (W.D. Ky. Oct. 12, 2006) 2

Walburn v. Lockheed Martin Corp., 431 F.3d 966 (6th Cir. 2005) 3

West v. Gibson, 527 U.S. 212 (1999) 4

DOCKETED CASE

Rockwell International Corp. v. United States ex rel. Stone, No. 05-1272 ..... 5, 6, 7

TABLE OF AUTHORITIES – Continued

Page

STATUTE AND RULE

31 U.S.C. § 3730(e)(4) 1, 3, 6

Supreme Court Rule 14.1 4

REPLY BRIEF FOR THE PETITIONERS

1. Respondents contend that the issue on which the circuits are divided is "narrow." BIO 11-12. That is incorrect. The Third and Fifth Circuits have held that any document produced pursuant to FOIA necessarily satisfies the statutory "public disclosure" requirement, because a FOIA request results in both an "administrative . . . report" and an "administrative . . . investigation" within the meaning of 31 U.S.C. § 3730(e)(4)(A). *United States ex rel. Mistick PBT v. Housing Auth.*, 186 F.3d 376, 383-84 (3d Cir. 1999); *United States ex rel. Reagan v. E. Texas Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 175-76 (5th Cir. 2004). The Ninth Circuit here, however, concluded that the public disclosure bar is triggered only if a document produced pursuant to FOIA is itself a "criminal, civil, or administrative hearing, . . . a congressional, administrative or [General] Accounting Office report, hearing, audit, or investigation, or [is] from the news media." Pet. App. 18. That Respondents can point to superficial points on which the circuits are in agreement (BIO 11) is of no moment. The reality is that in the Third and Fifth Circuits, all documents produced pursuant to FOIA constitute public disclosures, while in the Ninth Circuit, only a small subset of such documents will trigger the statutory bar.

2. Respondents do not deny that the circuits are split, but contend that the split is shallow, describing it as a "crevice." BIO 10, 12. If Respondents are suggesting that further percolation is desirable, that argument should be rejected. First, the Ninth Circuit understood and acknowledged that it was creating a direct circuit conflict. *See* Pet. App. 11-12. The split was thus not accidental, nor is it likely to resolve itself. Second, additional opinions by other courts of appeals are unlikely to further illuminate or

sharpen the issue. The question presented in the Petition is a straightforward matter of statutory interpretation. In fact, the two competing views about the relevant statutory language are already thoroughly set forth and debated in Justice (then-Judge) Alito's opinion for the court and Judge Becker's lengthy dissent in *Mistick*. *Compare* 186 F.3d at 382-85 *with id.* at 392-94.[1]

3. In the Petition, Petitioners noted that the Ninth Circuit buttressed its decision by suggesting that the public disclosure bar should turn on whether the government was actually on notice of the alleged fraud. Pet. 11-15. Respondents do not defend the Ninth Circuit's focus on the government's knowledge but instead argue that the court of appeals' reasoning is irrelevant, because this "Court reviews judgments, not opinions." BIO 14, citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). While that is true, Respondents have missed the point. As is explained in the Petition, the Ninth Circuit's reasoning goes well beyond that of its sister Circuits and threatens to exacerbate other existing intercircuit disagreements about the meaning of language

[1] Citing a recent district court decision, Respondents claim that "[l]ower courts have no difficulty applying the statutory bar with guidance from both courts." BIO 12, citing *United States v. Solinger*, ___ F. Supp. 2d ___, 2006 WL 2927509 (W.D. Ky. Oct. 12, 2006). In *Solinger*, the court discussed the circuit split identified in the Petition and decided to follow the Ninth Circuit's decision here instead of the Third Circuit's decision in *Mistick*, finding the former to be "more persuasive." *Id.* at *5. Respondents are thus incorrect in implying that the *Solinger* court attempted to reconcile the circuit split or harmonize *Mistick* with the decision below. To the contrary, the *Solinger* court simply joined one side of the split and, in so doing, deepened it. Presumably other lower courts will continue to do the same, choosing one side or the other. This is precisely why certiorari should be granted.

in the public disclosure bar. Moreover, the Ninth Circuit's expansion of jurisdiction under the False Claims Act beyond that recognized in other circuits will likely lead to forum shopping and make district courts in the Western states attractive to those who, like Relators, obtain documents from the government's own files through FOIA and then conduct "investigations" to assemble arguments that fraud has occurred.[2]

4. Respondents incorrectly suggest that, in order to resolve this case, the Court would be required to answer questions other than the question presented in the Petition. BIO 14-16. Specifically, Respondents argue that the Court, if it grants certiorari, will need to consider the questions (1) "whether a disclosure to the relator is a disclosure that is 'public,' when neither the agency nor the relator discloses to the general public," and (2) "whether 'transactions' of fraud must be disclosed in a single forum." *Id.* 15. Respondents made each of these arguments below. The Ninth Circuit expressly rejected the second argument, *see* Pet. App. 9 n.1, and implicitly rejected the first, as

[2] Respondents also contend that, despite its clear language to the contrary, § 3730(e)(4) is not jurisdictional. They cite authority from the Seventh Circuit, *see* BIO 2 n.1, which appears to have misread this Court's decision in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951 (1997) ("[t]he 1986 amendment [to the public disclosure bar] . . . *creates* jurisdiction where none previously existed; it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well") (emphasis in original). Other courts of appeals have concluded that the statute is jurisdictional. *See, e.g.*, *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 973 (6th Cir. 2005) ("§ 3730(e)(4) limits the subject matter jurisdiction of federal courts over *qui tam* actions . . . "); *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1048 (10th Cir. 2004) ("[s]atisfaction of the provisions of 31 U.S.C. § 3730(e)(4) is a question of subject matter jurisdiction") (internal quotation omitted).

Respondents appear to acknowledge, *see* BIO 11. Respondents have not sought certiorari on either of these confusing questions, and there would be no need or occasion for the Court to address either question if it were to grant review. The Court routinely declines to consider matters that fall outside the questions presented in a petition for certiorari. *E.g., Archer v. Warner*, 538 U.S. 314, 322 (2003); *West v. Gibson*, 527 U.S. 212, 223 (1999); *see* this Court's Rule 14.1.[3]

Respondents also note that, if this Court were to reverse, the Ninth Circuit would have additional work to do: it would proceed to the questions whether the allegedly "true" facts were also publicly disclosed and whether Respondents were an "original source." BIO 16; *see* Pet. App. 18. Respondents appear to be suggesting that certiorari is appropriate only if the Petitioner can secure a complete and final victory in this Court. Each term, however, the Court routinely issues opinions that require additional proceedings below. In its current posture, this case presents a certiorari-worthy issue. The fact that, following remand, there conceivably could be other scenarios under

[3] In a conditional cross-petition for certiorari, Relators have asked this Court to consider the meaning of the words "based upon" in the public disclosure bar. *See* Pet. in No. 06-473. In their Brief In Opposition, Relators contend that, even if the Court denies the conditional cross-petition, this additional issue "would need to be addressed" and that "the presence of the 'based upon' question complicates this case and makes it a significantly less practicable case for review." BIO 15-16. If the Court denies the conditional cross-petition, there would be no need for the Court to address the "based upon" issue or any other issue. (*See* authority cited at p. 4, *supra*.) If the Court grants the conditional cross-petition, it will, obviously, reach and presumably decide the "based upon" question. In neither event will this case be "unduly complicated," nor will the certiorari-worthiness of the FOIA issue be diminished.

which Petitioners might not ultimately prevail in the litigation should not be a reason for denying review.

5. Respondents argue that this case has "unique facts," making it unsuitable for review. They concede that Dr. Berens' grant application was produced to them pursuant to a FOIA request, but they contend there was no "report" or "investigation" by the government, because NIH, instead of copying the grant application and providing it directly to Dr. Haight, responded to the FOIA request by directing St. Joseph's Hospital to allow Haight to copy it. In *Mistick*, the Third Circuit held that an agency's consideration of, and response to, a FOIA request result in both an administrative "investigation" and "report." 186 F.3d at 383-84; *see also Reagan*, 384 F.3d at 175-76. So too here. NIH investigated Dr. Haight's FOIA request and reported back to her, just as the government agencies did in *Mistick* and *Reagan*. Simply put, in either the Third or Fifth Circuits, the courts would have ruled differently from the Ninth Circuit, notwithstanding the artificial factual issue Respondents attempt to raise about who ultimately copied and handed the document to Haight.

6. In *Rockwell International Corp. v. United States ex rel. Stone*, No. 05-1272, the Court recently granted certiorari to resolve a circuit split over the meaning of the term "original source" in the public disclosure bar. *See* Order of Sept. 26, 2006 in No. 05-1272. Respondents argue that *Rockwell* is unrelated to this case, because the Ninth Circuit did not reach the original source question here. BIO 17. There is, however, a close connection between the public disclosure requirement and the original source requirement. Together, they serve the goal of ensuring that only close insiders, not opportunistic outsiders, may bring *qui tam* suits. Indeed, several courts, including the

Ninth Circuit, have held that the public disclosure requirement is a "quick trigger to get to the more exacting original source inquiry." *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1476 n.18 (9th Cir. 1996), quoting and citing, *inter alia*, *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552 (10th Cir. 1992); *see also Cooper v. Blue Cross & Blue Shield*, 19 F.3d 562, 568 n.10 (11th Cir. 1994) (similar).

The court of appeals in this case conflated the public disclosure and original source requirements. It found its holding with respect to the FOIA issue to be supported by its understanding that Haight "put in substantial time and effort into uncovering the allegations the Relators make in their complaint." Pet. App. 17. The court concluded that "Haight performed precisely the sort of investigative work that the *qui tam* provisions of the FCA encourage in order to promote detection of fraud against the government." *Id.* 18. Thus, although the Ninth Circuit did not rule on the original source issue, it relied on original source concepts – that is, notions about the extent to which Relators allegedly originated the information on which they base their FCA claims. This Court likely will address these matters in *Rockwell*, where one of the issues is whether a former Rockwell employee's prediction about an alleged fraud was sufficient to satisfy the "direct and independent knowledge" requirement of 31 U.S.C. § 3730(e)(4)(B). It is, therefore, reasonably possible that the Court's opinion in *Rockwell* will shed light on whether it was appropriate for the Ninth Circuit to base its decision, at least in part, on Haight's "investigative work." Accordingly, if the Court does not grant the Petition, it

should, at a minimum, hold the Petition pending resolution of *Rockwell*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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